

## ARIZONA EVIDENCE REPORTER

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### ARTICLE 1. GENERAL PROVISIONS.

#### Rule 101. Scope.

**101.003** The Arizona Rules of Evidence govern proceedings in courts in the State of Arizona.

*State v. Campoy (Crockwell)*, 220 Ariz. 539, 207 P.3d 792, ¶26 n.5 (Ct App. 2009) (court noted that court may have based evidentiary rulings on principles of “fundamental fairness”; court stated that supreme court rules govern admissibility of evidence).

**101.020** The Arizona Legislature is permitted to enact statutory rules that are reasonable and workable and that supplement the rules promulgated by the Arizona Supreme Court.

*Jilly v. Rayes (Carter)*, 221 Ariz. 40, 209 P.3d 176, ¶¶ 1–8 (Ct. App. 2009) (court held A.R.S. § 12–2603, which provides that plaintiff suing health care professional must certify whether or not expert opinion testimony is necessary to prove health care professional’s standard of care or liability, and if expert opinion testimony is necessary, requires service of “preliminary expert opinion affidavit” with initial disclosures, did not conflict with any court rule, and thus was constitutional).

#### Rule 103. Rulings on Evidence.

##### Paragraph (a) — Effect of erroneous ruling.

**103.a.020** To preserve for appeal the question of admission of evidence, a party must make a specific and timely objection; if the party **fails to object**, the party will have waived the issue on appeal.

*Ritchie v. Krasner*, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 46 (Ct App. 2009) (defendant contended trial court abused discretion in precluding evidence of plaintiff’s prior felony conviction; court noted that felony conviction was admissible only to attack plaintiff’s credibility as witness, and only time plaintiff testified was at deposition; because defendant failed to raise timely plaintiff’s conviction during deposition, trial court did not abuse discretion in excluding evidence of plaintiff’s felony conviction at trial).

**103.a.090** To preserve for appeal the question of exclusion of evidence, a party must make a **specific and timely objection**, and must make an offer of proof showing that the excluded evidence would be admissible and relevant, unless either the substance of the evidence is apparent from the context of the record, or the trial court excludes the evidence on substantive rather than evidentiary grounds.

*State v. McKenna*, 222 Ariz. 396, 214 P.3d 1037, ¶¶ 16–18 (Ct. App. 2009) (defendant was convicted of felony murder; defendant admitted he killed victim, but contended trial court erred in precluding evidence that victim had cocaine in his body, and further contended that, if trial court had not precluded cocaine evidence, he would have presented other relevant evidence; court held defendant should have made offer of proof of what this other evidence was, and because he did not, court could not grant relief).

**103.a.165** Once the trial court has ruled that the state may ask defendant's character witnesses on cross-examination whether they know about the defendant's prior conviction, if the defendant does not then call those character witnesses to testify, the defendant may not question on appeal the trial court's ruling.

*State v. Romar*, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5-10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit "such a crime" (opinion does not state whether "such a crime" is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court's ruling).

**Paragraph (b) — Record of offer and ruling.**

**103.b.010** The appellant has the duty to make a record at trial to support the claim of error on appeal, and absent such a record, the appellate court will presume that the evidence presented to the trial court was sufficient to maintain its evidentiary rulings.

*Kline v. Kline*, 221 Ariz. 564, 212 P.3d 902, ¶¶ 7-10, 26-33 (Ct. App. 2009) (in civil case, wife filed third-party complaint against husband, who was properly served; trial court held default hearing, which husband did not attend; trial court approved factual findings and conclusions of law proposed by wife, and ordered that husband pay wife \$285,155.56 compensatory damages and \$100,000 punitive damages; because husband did not provide to appellate court transcript of default hearing, court presumed record supported trial court's decision).

**Rule 401. Definition of "Relevant Evidence."**

**Civil Cases**

**401.civ.010** For evidence to be relevant, it must satisfy two requirements; the first is the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

*Wendland v. Adobeair, Inc.*, 223 Ariz. 199, 221 P.3d 390, ¶¶ 12-26 (Ct. App. 2009) (Partners leased property containing three buildings to Adobeair (defendant); defendant relocated its manufacturing business and removed press machines from building 2, leaving 12 foot deep pits that had been under press machines; defendant agreed to fill pits to return floor to flat surface before returning building to Partners; Partners hired general contractor to remodel building, but told general contractor not to work in building 2 until pits were filled in; general contractor asked plaintiff to give bid for part of remodeling project; plaintiff entered building 2, and because of poor lighting conditions, fell into pit; defendant moved *in limine* to preclude plaintiff's expert from giving testimony on standard of care because that opinion was based on OSHA standards; court agreed that defendant was not bound by OSHA regulations, but held jurors could consider OSHA standards along with other relevant evidence to determine whether defendant had notice of unreasonably dangerous condition and whether it failed to use reasonable care to provide warnings or adequate safeguards, thus trial court did not abuse discretion in allowing defendant's expert to testify about OSHA standards).

*Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court did not follow rule that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead followed rule that trial court has discretion to admit such letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

*Ritchie v. Krasner*, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 12–22 (Ct App. 2009) (plaintiff injured back at work; worker's compensation carrier retained defendant to perform independent medical examination; prior to examination, plaintiff signed agreement stating that no doctor-patient relationship existed between plaintiff and defendant; defendant opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was later examined by AHCCCS doctor, who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; plaintiff developed condition called "central pain syndrome," which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; prior to his death, plaintiff filed malpractice complaint against various doctors; after trial, jurors returned verdict of \$5 million and found defendant 28.5% at fault; court concluded that, because defendant was hired to determine extent of plaintiff's work-related injuries and make treatment recommendations, he assumed duty to conform to legal standards of reasonable conduct in light of apparent risk, thus trial court correctly held defendant owed duty of reasonable care to plaintiff; defendant contended trial court erred in precluding admission of limited liability agreement; court held that, because defendant's duty to plaintiff did not depend on doctor-patient relationship, agreement that there was no doctor-patient relationship was not relevant, thus trial court was correct in precluding its admission).

*Brethauer v. General Motors Corp.*, 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–16 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and bounced through ditch; side and rear windows shattered and plaintiff was ejected out rear window; plaintiff asserted he was wearing seat belt; plaintiff contended seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion to preclude evidence that GM recalled certain 1994–95 C/K extended cab pick-up trucks because, if both lap and shoulder belt energy management loops in those vehicles released at same time in frontal collision, resulting inertial forces and loading of belts could cause buckle to unlatch; although plaintiff drove different 1998-model pick-up truck, both models used identical "JDC buckle"; plaintiff claimed recall evidence was relevant to show both that JDC buckle had potential to release due to inertial forces and that GM knew about this defect; court held that fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through rough terrain caused JDC buckle to unlatch prior to any impact; court noted plaintiff's truck did not have same fabric belt system that GM replaced in C/K trucks, that plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in C/K trucks, JDC buckles could have unlatched prior to collision, thus recall of C/K trucks to replace belting system in order to avoid unlatching in frontal collisions did not have tendency to make it more probable that JDC buckle unlatched during plaintiff's accident).

**401.civ.020** For evidence to be relevant, it must satisfy two requirements; the **second** is the evidence must make the fact that is of consequence more or less probable (relevance).

*Wendland v. Adobeair, Inc.*, 223 Ariz. 199, 221 P.3d 390, ¶¶ 12-26 (Ct. App. 2009) (Partners leased property containing three buildings to Adobeair (defendant); defendant relocated its manufacturing business and removed press machines from building 2, leaving 12 foot deep pits that had been under press machines; defendant agreed to fill pits to return floor to flat surface before returning building to Partners; Partners hired general contractor to remodel building, but told general contractor not to work in building 2 until pits were filled in; general contractor asked plaintiff to give bid for part of remodeling project; plaintiff entered building 2, and because of poor lighting conditions, fell into pit; defendant moved *in limine* to preclude plaintiff's expert from giving testimony on standard of care because that opinion was based on OSHA standards; court agreed that defendant was not bound by OSHA regulations, but held jurors could consider OSHA standards along with other relevant evidence to determine whether defendant had notice of unreasonably dangerous condition and whether it failed to use reasonable care to provide warnings or adequate safeguards, thus trial court did not abuse discretion in allowing defendant's expert to testify about OSHA standards).

*In re MH 2008-002596*, 223 Ariz. 32, 219 P.3d 242, ¶¶ 12-16 (Ct. App. 2009) (appellant sought relief from order of commitment for involuntary mental health treatment; statute required testimony of two or more witnesses acquainted with patient; appellant contended one witness did not qualify as acquaintance witness because her contact with him was limited to one 15 minute telephone conversation; court held that this telephone conversation gave witness personal knowledge; court noted that appellant had told witness that he had overdosed on medications and that he would refuse help by lying to first responders; court held this information was relevant).

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶¶ 19-21 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus trial court correctly precluded this evidence).

*Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 212 P.3d 17, ¶¶ 32-37 (Ct. App. 2009) (court did not follow rule that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead followed rule that trial court has discretion to admit such letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

*Ritchie v. Krasner*, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 12–22 (Ct App. 2009) (plaintiff injured back at work; worker's compensation carrier retained defendant to perform independent medical examination; prior to examination, plaintiff signed agreement stating that no doctor-patient relationship existed between plaintiff and defendant; defendant opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was later examined by AHCCCS doctor, who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; plaintiff developed condition called "central pain syndrome," which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; prior to his death, plaintiff filed malpractice complaint against various doctors; after trial, jurors returned verdict of \$5 million and found defendant 28.5% at fault; court concluded that, because defendant was hired to determine extent of plaintiff's work-related injuries and make treatment recommendations, he assumed duty to conform to legal standards of reasonable conduct in light of apparent risk, thus trial court correctly held defendant owed duty of reasonable care to plaintiff; defendant contended trial court erred in precluding admission of limited liability agreement; court held that, because defendant's duty to plaintiff did not depend on doctor-patient relationship, agreement that there was no doctor-patient relationship was not relevant, thus trial court was correct in precluding its admission).

*Brethauer v. General Motors Corp.*, 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–16 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and bounced through ditch; side and rear windows shattered and plaintiff was ejected out rear window; plaintiff asserted he was wearing seat belt; plaintiff contended seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion in limine to preclude evidence that GM recalled certain 1994–95 C/K extended cab pick-up trucks ("C/K trucks") because, if both lap and shoulder belt energy management loops in those vehicles released at same time in frontal collision, resulting inertial forces and loading of belts could cause buckle to unlatch; although plaintiff drove different 1998-model pick-up truck, both models used identical "JDC buckle"; plaintiff claimed recall evidence was relevant to show both that JDC buckle had potential to release due to inertial forces and that GM knew about this defect; court held that fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through rough terrain caused JDC buckle to unlatch prior to any impact; court noted that plaintiff's truck did not have same fabric belt system that GM replaced in C/K trucks, that plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in C/K trucks, JDC buckles could have unlatched prior to collision, thus recall of C/K trucks to replace belting system in order to avoid unlatching in frontal collisions did not have tendency to make it more probable that JDC buckle unlatched during plaintiff's accident).

## Criminal Cases

**401.cr.020** For evidence to be relevant, it must satisfy two requirements; the **second** is the evidence must make the fact that is of consequence more or less probable (relevance).

*State v. McKenna*, 222 Ariz. 396, 214 P.3d 1037, ¶¶ 12–15 (Ct. App. 2009) (defendant was convicted of felony murder; defendant admitted he killed victim, but contended trial court erred in precluding evidence that victim had cocaine in his body because, if victim had been high on cocaine, he may have been initial aggressor; because uncontradicted evidence was that defendant arrived at victim's back door wearing bandana over face and brandishing gun, court concluded trial court did not err in precluding cocaine evidence).

**401.cr.050** Arizona law makes no distinction between direct and circumstantial evidence.

*State v. Muscove*, 223 Ariz. 164, 221 P.3d 43, ¶¶ 5–7 (Ct. App. 2009) (defendant's requested instruction drew distinction between weight assigned to circumstantial versus direct evidence by implying that greater degree of proof was required for jurors to rely on circumstantial evidence; because direct and circumstantial evidence are of intrinsically similar probative value, there is no logically sound reason for drawing distinction in weight to be assigned to each, thus trial court properly refused to give defendant's requested instruction).

**401.cr.055** Although a factual stipulation is binding on the parties, it is not binding on the jurors.

*State v. Allen*, 223 Ariz. 125, 220 P.3d 245, ¶¶ 1, 11 (2009) (defendant was charged with possession of marijuana; trial court read to jurors stipulation between defendant and state that defendant was in possession of usable amount of marijuana; court held that, when defendant stipulates to elements of an offense, unless defendant pleads guilty to the offense, trial court does not have to go through guilty plea litany).

**401.cr.350** A photograph is admissible if relevant to an expressly or impliedly contested issue.

*State v. Kiles*, 222 Ariz. 25, 213 P.3d 174, ¶¶ 34–38 (2009) (defendant contended trial court erred in admitting various photographs; because defendant in his opening brief specified his objection to only two photographs, court held defendant waived any argument for the other photographs; court noted that photograph of adult victim showed her broken arm, which medical testimony explained was defensive wound, and thus held photograph was relevant to issue of whether defendant committed first-degree murder; because jurors did not choose death sentence for killing of child victim, court held defendant was not prejudiced by admission of photograph showing body of child victim).

*State v. Dann*, 220 Ariz. 351, 207 P.3d 604, ¶¶ 44–47 (2009) (defendant contended trial court denied him his right to fair trial when it admitted autopsy photographs, which he contended were gruesome; court held photographs were relevant because they gave jurors clear picture of temporal, spatial, and motivational relationship of three killings, thus trial court did not abuse discretion in admitting photographs).

## Impeachment Cases

**401.imp.070** Specific instances of the witness's conduct or a party's conduct are admissible if they show bias, prejudice, interest, or corruption on the part of the witness, or how they may have affected the witness's testimony.

*American Fam. Mut. Ins. v. Grant*, 222 Ariz. 507, 217 P.3d 1212, ¶¶ 2–30 (Ct. App. 2009) (respondent made claim with petitioner for injuries from automobile collision; petitioner retained orthopedic surgeon (Dr. Zoltan), who opined that respondent's injury was result of preexisting degenerative joint disease, so petitioner denied claim; respondent sued petitioner and sought discovery involving financial arrangements between petitioner and Zoltan; trial court ordered Zoltan to provide various items of information covering last 8 years; petitioner conceded that respondent may take Zoltan's deposition to demonstrate any bias, including general inquiry into his involvement in case, who hired him, his credentials, compensation received for this case, approximate number of examinations and record reviews he performed in last year, his dealings generally with petitioner and their law firm, approximate amount received for expert services in last year, approximate percentage of practice devoted to litigation-based examinations and record reviews, and his knowledge of other cases where he testified during last 4 years; court vacated challenged portions of trial court's discovery order and remanded so trial court could assess whether respondent had explored less intrusive discovery, and if so, whether respondent could demonstrate good cause for any more expanded inquires).

### **Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.**

**402.070** The Arizona Legislature is permitted to enact statutory rules that are reasonable and workable and that supplement the rules promulgated by the Arizona Supreme Court.

*Jilly v. Rayes (Carter)*, 221 Ariz. 40, 209 P.3d 176, ¶¶ 1–8 (Ct. App. 2009) (court held that A.R.S. § 12–2603, which provides that plaintiff suing health care professional must certify whether or not expert opinion testimony is necessary to prove health care professional's standard of care or liability, and if expert opinion testimony is necessary, requires service of "preliminary expert opinion affidavit" with initial disclosures, did not conflict with any court rule, and thus was constitutional).

### **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.**

## Civil Cases

**403.civ.010** If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

*Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court did not follow rule that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead followed rule that trial court has discretion to admit such letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

*Ritchie v. Krasner*, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 40–44 (Ct. App. 2009) (plaintiff injured back at work; defendant opined that plaintiff's condition was stable and that he could go back to work; AHCCCS doctor later diagnosed cervical spinal cord compression and recommended surgery; condition prior to surgery caused part of plaintiff's spinal cord to die, which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; defendant contended trial court abused discretion in precluding evidence of plaintiff's alcoholism; court held that, because trial court allowed evidence of plaintiff's predisposition to abusing pain drugs, it did not abuse its discretion in precluding evidence of specifics of alcoholism and drug use based on its determination that evidence was "too unclear," "too remote," and "too prejudicial").

**403.civ.030** Because evidence that is relevant will generally be adverse to the opposing party, use of the word "prejudicial" to describe this type of evidence is incorrect and cannot be the basis for excluding evidence under this rule; evidence is "unfairly prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶¶ 15–18 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended trial court erred in admitting letter from FAA to SWA concerning 1998 incident in which SWA permitted other bounty hunters who had presented false information to board SWA flight; letter stated SWA failed to ask basic questions that would have prevented deception, and further advised SWA that there appeared to be prevalent problem in Arizona where individuals calling themselves bail recovery agents or bounty hunters have been able to present themselves as being authorized to travel armed when they were not so authorized; court held letter was admissible to show SWA had notice of problem of bounty hunters attempting to fly while armed and what steps SWA should take to prevent this from happening; court further held that letter would not have caused jurors to punish SWA for repeated lapses in checking identifications because (1) letter did not say SWA had "prevalent problem" and was instead only warning about single event, (2) trial court gave limiting instruction, and (3) SWA's attorney testified he was unaware of this "prevalent problem," explicitly dispelling any notion that SWA had experienced such problem).

**403.civ.040** If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of confusing the issues or misleading the jurors, and establishes that this danger of confusing the issues substantially outweighs the probative value.

*Brethauer v. General Motors Corp.*, 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–17 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and bounced through ditch; side and rear windows shattered and plaintiff was ejected out rear window; plaintiff asserted he

was wearing seat belt; plaintiff contended seat belt buckle was defective and unlatched improperly; trial court precluded evidence that GM recalled certain 1994–95 pick-up trucks because seat belt buckle could become improperly unlatched in frontal collision; trial court precluded this evidence because, although plaintiff’s truck had same buckle, plaintiff’s truck did not have same fabric belt system as in 1994–95 trucks, plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in 1994–95 trucks, buckles could have unlatched prior to collision; court held that, even if this evidence were considered relevant, trial court did not abuse discretion in precluding it because it could have misled jurors because of differences in design of two systems and type of accident).

*Brethauer v. General Motors Corp.*, 221 Ariz. 192, 211 P.3d 1176, ¶¶ 18–20 (Ct. App. 2009) (plaintiff contended trial court erred by precluding 3-minute videotaped collage of 10 GM-conducted tests on seat belt systems containing same buckle as involved in subject litigation; because seven tests were of seat belt systems containing different fabric belts than one involved in subject litigation, one involved torn belt webbing at latch plate of buckle prototype due to sewing problem, one involved buckle that unlatched when test dummy struck release button after impact, and one involved buckle release that occurred on rebound of dummy after crash, trial court precluded videotape because it could have confused jurors, wasted time, and caused unfair prejudice to GM; court held that trial court did not abuse discretion in precluding videotape).

### **Criminal Cases**

**403.cr.100** Once the trial court determines that a photograph has probative value, the trial court, if requested, must determine whether the photograph has any danger of unfair prejudice, and if so, whether the danger of unfair prejudice substantially outweighs the probative value.

*State v. Kiles*, 222 Ariz. 25, 213 P.3d 174, ¶ 37 (2009) (because photograph of adult victim showed her broken arm, which medical testimony explained was defensive wound, court held photograph was relevant to issue of whether defendant committed first-degree murder; court noted defendant identified nothing about photograph that was particularly inflammatory, especially given that “[t]here is nothing sanitary about murder”).

*State v. Dann*, 220 Ariz. 351, 207 P.3d 604, ¶¶ 44–47 (2009) (defendant contended trial court denied him his right to fair trial when it admitted autopsy photographs, which he contended were gruesome; court held photographs were relevant because they gave jurors clear picture of temporal, spatial, and motivational relationship of three killings; court stated “there is nothing sanitary about murder” and that “nothing requires a trial judge to make it so”; court noted trial court carefully examined all crime scene and autopsy photographs and excluded most gruesome ones, thus trial court did not abuse discretion in admitting photographs).

**Rule 404(a)(2). Character Evidence Not Admissible To Prove Conduct; Exceptions — Character of the victim.**

**Criminal Cases**

**404.a.2.cr.010** The defendant in a criminal case is permitted to offer evidence of a trait of the victim's character provided that trait of character is pertinent to the litigation.

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶ 25 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; defendant was permitted to offer evidence of victim's character for violence, but could do so only through evidence of opinion or reputation).

**404.a.2.cr.030** Evidence of specific acts of violence by a victim are admissible only when the defendant personally observed those acts or when the defendant knew of those acts prior to the charged offense.

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 25, 35–40 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; because defendant did not know of victim's specific acts of violence at time confrontation occurred, defendant was not permitted to introduce evidence of those specific acts of violence).

**Rule 404(b). Character Evidence Not Admissible To Prove Conduct — Other crimes, wrongs, or acts.**

**Civil Cases**

**404.b.civ.050** If the conduct in committing the other crime, wrong, or act was a **necessary preliminary** to, or an **inevitable result** of, the conduct that is the subject of the litigation, evidence of the other act or acts will **complete the story** and will be **intrinsic** evidence, and thus admissible without a Rule 404(b) analysis.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶ 22 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant, and conduct in Maryland was not "necessary preliminary" to crimes charged for transporting weapons on airplane, thus this was not intrinsic evidence).

**404.b.cIV.060** If the conduct in committing the other crime, wrong, or act is so connected with the conduct that is the subject of the litigation that proof of one **incidentally involves** proof of another or **explains the circumstances** of the conduct that is the subject of the litigation, evidence of the other act or acts will **complete the story** and will be **intrinsic** evidence, and thus admissible without a Rule 404(b)

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶ 23 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant; and that conduct that was the subject of litigation was manner that plaintiffs were able to fly with weapons, plaintiffs' arrest, incarceration, and eventual prosecution, and SWA's role in post-arrest investigation, and that plaintiffs' purported violations of other laws did not explain these events, thus this other act evidence did complete the story, so it was not intrinsic evidence).

**404.b.civ.100** If the **extrinsic** evidence of the other crime, wrong, or act is not relevant to any issue being litigated, then the only effect of that evidence is to show that the person has a bad character, and thus it would be error to admit the evidence.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶ 21 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus evidence was not relevant, and only purpose would be to show character to prove actions in conformity with character during event in question, which Rule 404(b) specifically excludes).

**404.b.civ.240** Extrinsic evidence of another crime, wrong, or act is relevant to show knowledge.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶¶ 11-14 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of \$500,000 each in compensatory damages and \$4 million each in punitive damages; SWA contended trial court erred in admitting letter from FAA to SWA concerning 1998 incident in which SWA permitted other bounty hunters who had presented false information to board SWA flight; letter stated SWA failed to ask basic questions that would have prevented deception, and further advised SWA that there appeared to be prevalent problem in Arizona where individuals calling themselves bail recovery agents or bounty hunters have been able to present themselves as being authorized to travel armed when they were not so authorized; court held letter was admissible to show SWA had notice of problem of bounty hunters attempting to fly while armed and what steps SWA should take to prevent this from happening).

#### **Criminal Cases**

**404.b.cr.200** Extrinsic evidence of another crime, wrong, or act may be relevant to show credibility.

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 41-49 (Ct. App. 2009) (defendant was charged with killing victim; defendant's version of events was that he was hiking on trail when victim's dogs came toward him, so he shot into ground, which caused dogs to disperse; victim then came running toward defendant, so defendant told victim to stop, and when victim did not stop, defendant shot victim three times in chest, killing him; because state attacked defendant's credibility in version he gave of events, and because there were no other witnesses to shooting, and because victim's prior acts were essentially similar to conduct defendant described, trial court should have allowed defendant to introduce evidence of victim's prior acts with his dogs to prove victim's character in order to show victim was acting in conformity with that character when defendant killed him).

**404.b.cr.503** In determining whether the proponent has sufficient evidence from which the trier-of-fact could conclude, by clear and convincing evidence, that the other act happened, the person committed the act, and the circumstances of that act were as the proponent claims, the trial court is not required to hold an evidentiary hearing at which the proponent would have to produce its witnesses and have the other party cross-examine them; the trial court is instead required to make a determination of the admissibility of the evidence under Rule 104(a), which provides that the trial court is not bound by the rules of evidence in making that ruling. (see *Huddleston v. U.S.*, 485 U.S. 681 (1988).)

*State v. LeBrun*, 222 Ariz. 183, 213 P.3d 332, ¶¶ 5-16 (Ct. App. 2009) (state sought to join for trial four cases with total of 13 counts of sexual conduct with minors, and sought to introduce other act evidence of defendant's conduct with four other boys; trial court refused defendant's request for live evidentiary hearing and instead reviewed video and audio tapes of statements made by victims; court held trial court's review of tapes was sufficient for it to determine whether state had sufficient evidence from which jurors could conclude by clear and convincing evidence that defendant committed other acts).

**Rule 405(a). Methods of Proving Character — Reputation or opinion.**

**405.a.010** When a party is permitted to introduce evidence of character, the party may do so either by reputation or opinion testimony.

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 25–28 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; defendant was permitted to offer evidence of victim’s character for violence, but could do so only through evidence of opinion or reputation).

**405.a.050** Once a witness has offered character evidence on direct examination or cross-examination, the other party, on cross-examination or redirect, may ask the witness about knowledge of specific instances of conduct relevant to the character trait presented.

*State v. Romar*, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5–10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit “such a crime” (opinion does not state whether “such a crime” is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court’s ruling).

**405.a.055** Once the trial court has ruled that the state may ask defendant’s character witnesses on cross-examination whether they know about the defendant’s prior conviction, if the defendant does not then call those character witnesses to testify, the defendant may not question on appeal the trial court’s ruling.

*State v. Romar*, 221 Ariz. 342, 212 P.3d 34, ¶¶ 5–10 (Ct. App. 2009) (defendant was charged with sexual offenses against child; defendant had two 22-year-old convictions for sexual abuse; defendant indicated he would call eight to ten character witnesses; trial court ruled that state would be permitted on cross-examination to ask character witnesses if they knew defendant had two prior convictions, but would not allow state to specify name or nature of offenses unless character witnesses gave their opinion that defendant would not commit “such a crime” (opinion does not state whether “such a crime” is offense charged or prior offense); at trial, defendant did not call any character witnesses; court held that, by failing to call character witnesses, defendant failed to preserve his claim of error, and thus court declined to consider correctness of trial court’s ruling).

**405.a.070** Evidence of a victim’s specific acts of violence are admissible only when the defendant personally observed those acts or knew of them before the alleged assault or homicide.

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶ 25 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; because defendant did not know of victim’s specific acts of violence at time confrontation occurred, defendant was not permitted to introduce evidence of those specific acts of violence).

**Rule 405(b). Methods of Proving Character —Specific instances of conduct.**

**405.b.010** To be an “essential element” under this rule, the character trait must be an operative fact that determines the rights and liabilities of the parties under the substantive law.

*State v. Fish*, 222 Ariz. 109, 213 P.3d 258, ¶¶ 28–29 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; court held that victim’s character was not essential element of claim of self-defense, thus defendant was not permitted to introduce evidence of specific acts of violence).

**Rule 406. Habit; Routine Practice.**

**406.010** Habit describes a person’s regular or semi-automatic response to a repeated specific situation, while character refers to a generalized description of a person’s disposition.

*State v. Slover*, 220 Ariz. 239, 204 P.3d 1088, ¶¶ 15–18 (Ct. App. 2009) (while intoxicated, defendant drove off roadway; truck rolled down embankment and landed on roof over shallow creek; officers found passenger-victim dead, lying in creek with head submerged in water; victim had BAC of .231; defendant contended that victim was driving truck, and claimed he and victim had habit of driving each other’s trucks; defendant offered as habit evidence testimony of gas station attendant that, over 4-year period she worked at gas station, defendant frequently was driving when they arrived while victim was driving when they left; trial court precluded this evidence because it concluded victim’s driving was not semi-automatic or reflexive, or sufficiently specific, regular, or numerous to qualify as habit evidence; court agreed with trial court’s reasoning and held trial court did not abuse discretion in precluding that evidence).

**Rule 407. Subsequent Remedial Measures.**

**407.020** The purpose of Rule 407 is to encourage remedial measures by freeing a party from concern that evidence of taking of such measures might be used against the party as an admission by conduct.

*Johnson v. State ex rel. Dept. of Trans.*, 222 Ariz. 58, 213 P.3d 207, ¶ 7 (Ct. App. 2009) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent’s vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; before trial, there was factual dispute whether ADOT knew of decedent’s death when it decided to place warning signs near intersection; court held that requiring prior knowledge of collision would upset underlying policy that rule was designed to implement because potential defendant would be reluctant to make safety changes for fear that it could be sued over accidents about which it had no knowledge and would not be afforded protection of rule).

**407.030** Rule 407 applies whenever measures are taken after an event; there is no requirement that the party must have known about the event prior to taking the remedial measures.

*Johnson v. State ex rel. Dept. of Trans.*, 222 Ariz. 58, 213 P.3d 207, ¶¶ 7–12 (Ct. App. 2009) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; before trial, there was factual dispute whether ADOT knew of decedent's death when it decided to place warning signs near intersection; court held that knowledge of collision was not prerequisite for application of Rule 407, thus whether or not ADOT knew of collision was not relevant).

**407.040** Although the trial court may not admit evidence of a subsequent remedial measure to prove negligence or culpable conduct, it may do so for some relevant purpose, such as to show ownership, control, or feasibility of precautionary measures, or for impeachment.

*Johnson v. State ex rel. Dept. of Trans.*, 222 Ariz. 58, 213 P.3d 207, ¶¶ 13–20 (Ct. App. 2009) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; plaintiff contended evidence of sign and message board should have been admitted for other purpose, i.e., to rebut state's assertions that decedent was comparatively at fault; court held this was just another way to show defendant's negligence, thus rule precluded this evidence).

*Johnson v. State ex rel. Dept. of Trans.*, 222 Ariz. 58, 213 P.3d 207, ¶¶ 21–24 (Ct. App. 2009) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; plaintiff contended evidence of sign and message board should have been admitted for other purpose, i.e., to rebut state's claim that hazard was open and obvious; court held this was just another way to show defendant's negligence, thus rule precluded this evidence).

*Johnson v. State ex rel. Dept. of Trans.*, 222 Ariz. 58, 213 P.3d 207, ¶¶ 25–26 (Ct. App. 2009) (truck turned onto highway, and after truck traveled approximately 713 feet, it was struck from behind by decedent's vehicle; after collision, ADOT installed truck-crossing sign and variable message board to warn drivers that trucks would be entering highway; plaintiff contended evidence of sign and message board should have been admitted for other purpose, i.e., to show state's knowledge and recognition of dangerous condition and to rebut state's argument of safety; court held this was just another way to show defendant's negligence, thus rule precluded this evidence).

**Rule 410. Offer To Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty.**

**410.010** Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere or no contest, or an offer to plead guilty, nolo contendere, or no contest to the crime charged or any other crime is not admissible against the person who made the plea or offer in any civil or criminal action or administrative proceeding.

*State v. Campoy (Crockwell)*, 220 Ariz. 539, 207 P.3d 792, ¶¶ 5-10 (Ct App. 2009) (prosecutor told defendant he would have to participate in “debriefing” or “free talk” if defendant was interested in plea agreement; on 4/11/07, defendant gave first statement; on 4/19/07, defendant and state entered into plea agreement; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; state implicitly conceded that Rule 410 precluded admission of defendant’s first statement in case-in-chief).

**410.030** The phrase “statements made in connection with” a plea of guilty, nolo contendere, or no contest applies only to the statements made during the plea negotiations or the taking of the plea, and does not apply to any statements made after the plea agreement that the defendant made pursuant to a truthful-cooperation clause.

*State v. Campoy (Crockwell)*, 220 Ariz. 539, 207 P.3d 792, ¶¶ 5-25 (Ct App. 2009) (prosecutor told defendant he would have to participate in “debriefing” or “free talk” if defendant was interested in plea agreement; on 4/11/07, defendant gave first statement; on 4/19/07, defendant and state entered into plea agreement that provided that defendant would tell the truth and cooperate with investigation; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; court held that, because defendant gave second and third statements pursuant to cooperation clause, Rule 410 did not preclude state from using second and third statements in case-in-chief).

**410.040** Although this rule prohibits the introduction of the plea discussions and any statements made at a hearing on the plea, a defendant may waive that protection by entering into an agreement that provides (1) that the defendant will cooperate truthfully, (2) that the state may withdraw from the plea agreement if the defendant does not cooperate truthfully, and (3) if the state withdraws from the plea agreement, it may use against the defendant any statements made pursuant to the plea agreement.

*State v. Campoy (Crockwell)*, 220 Ariz. 539, 207 P.3d 792, ¶¶ 26-34 (Ct App. 2009) (prosecutor told defendant he would have to participate in “debriefing” or “free talk” if defendant was interested in plea agreement; on 4/11/07, defendant gave statement; on 4/19/07, defendant and state entered into plea agreement that provided that defendant would tell truth and cooperate with investigation; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; court held that, although Rule 410 would preclude state from using first statement, defendant waived protection of that rule by entering into agreement and then breaching it, thus state could use first statement in case-in-chief).

## **Rule 411. Liability Insurance.**

**411.015** Although the trial court may not admit evidence of liability insurance to prove that a party acted negligently or otherwise wrongfully, it may admit such evidence if offered for some relevant purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

*American Fam. Mut. Ins. v. Grant*, 222 Ariz. 507, 217 P.3d 1212, ¶¶ 2–30 (Ct. App. 2009) (respondent made claim with petitioner for injuries from automobile collision; petitioner retained orthopedic surgeon (Dr. Zoltan), who opined that respondent's injury was result of preexisting degenerative joint disease, so petitioner denied claim; respondent sued petitioner and sought discovery involving financial arrangements between petitioner and Zoltan; trial court ordered Zoltan to provide various items of information covering last 8 years; petitioner conceded that respondent may take Zoltan's deposition to demonstrate any bias, including general inquiry into his involvement in case, who hired him, his credentials, compensation received for this case, approximate number of examinations and record reviews he performed in last year, his dealings generally with petitioner and their law firm, approximate amount received for expert services in last year, approximate percentage of practice devoted to litigation-based examinations and record reviews, and his knowledge of other cases where he testified at depositions or trials during last 4 years; court vacated challenged portions of trial court's discovery order and remanded so that trial court could assess whether respondent had explored less intrusive discovery, and if so, whether respondent could demonstrate good cause for any more expanded inquiries).

*Ritchie v. Krasner*, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 40–44 (Ct App. 2009) (plaintiff injured back at work; defendant doctor opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was examined by AHCCCS doctor who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; defendant contended trial court abused discretion in allowing plaintiff to introduce evidence of his financial situation and loss of workers' compensation benefits; court held trial court properly admitted that evidence to rebut fact that he did not receive continuing care between when he saw defendant and when he saw AHCCCS doctor).

## **Rule 501. Privilege — General Rule.**

### **Attorney-Client.**

**501.160** An attorney-client privilege does not exist when the client retains the attorney for the purpose of promoting intended or continuing criminal or fraudulent activity.

*Kline v. Kline*, 221 Ariz. 564, 212 P.3d 902, ¶¶ 34–37 (Ct. App. 2009) (trial court concluded husband was committing fraud against wife, and so ordered husband's attorney to testify).

**501.165** For the “crime-fraud” exception to the attorney-client privilege to apply, there must be a prima facie showing that a communication with an attorney was used to perpetuate a crime or fraud.

*Kline v. Kline*, 221 Ariz. 564, 212 P.3d 902, ¶¶ 34–37 (Ct. App. 2009) (trial court concluded husband was committing fraud against wife, and so ordered husband’s attorney to testify; trial court did not find crime-fraud exception applied merely because wife claimed there was fraud, rather trial court considered facts in wife’s complaint, which court held were well-pled pursuant to rules of civil procedure; court held trial court did not abuse discretion in applying crime-fraud exception).

#### **Arizona Medical Board.**

**501.260** A.R.S. § 32–1451(A) abrogated the common law, which provided an absolute privilege for reports involving professional misconduct in quasi-judicial proceedings, and replaced it with a privilege for one who provides information in good faith.

*Advanced Cardiac Spec. v. Tri-City Cardio. Consul.*, 222 Ariz. 383, 214 P.3d 1024, ¶¶ 7–11 (Ct. App. 2009) (court concluded defendant did not abuse statutory privilege and thus affirmed trial court’s grant of summary judgment to defendant).

#### **Cleric/Priest-Penitent.**

**501.271** The cleric/priest-penitent privilege exists when **three** factors exist, the first of which is the person who received the confession was a cleric or priest.

*State v. Archibeque*, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7–9 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed Church bestowed title of “Bishop,” and that Bishop maintained office at local church, managed ecclesiastical and financial issues, handled repentance process and confessions, and oversaw sacrament meetings, other Sunday meetings, and youth programs; Bishop therefore qualified as cleric or priest).

**501.272** The cleric/priest-penitent privilege exists when **three** factors exist, the **second** of which is the cleric or priest was acting in a professional capacity as a cleric or priest.

*State v. Archibeque*, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7, 10–11 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed defendant made confession to Bishop in church office, Bishop received confessions in his “role as the Bishop,” and confession was made in furtherance of repentance process as recognized by Church; defendant therefore made confession while Bishop was serving in professional capacity).

**501.273** The cleric/priest-penitent privilege exists when **three** factors exist, the **third** of which is the confession was made in the course of discipline enjoined by the religious organization to which the cleric or priest belongs, which focuses on the duties and obligations of cleric or priest and the rules and obligations of the cleric’s or priest’s faith.

*State v. Archibeque*, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7, 12–13 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; Bishop testified that repentance process is official church doctrine and Bishop's duties include facilitating repentance process; defendant therefore made confession in the course of discipline enjoined by Church).

**501.280** A “clergyman” is not limited only to an ordained clergy; instead, whether a person is a clergyman of a particular organization is determined by that organization's ecclesiastical rules, customs, and laws.

*State v. Archibeque*, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7–9 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed Church bestowed title of “Bishop,” and that Bishop maintained office at local church, managed ecclesiastical and financial issues, handled repentance process and confessions, and oversaw sacrament meetings, other Sunday meetings, and youth programs; Bishop therefore qualified as cleric or priest).

#### **Physician-Patient.**

**501.600** In order for the physician-patient privilege to apply, (1) the patient must not consent to the testimony, (2) the witness must be a physician or surgeon, (3) the information must have been imparted to the physician while treating the patient, and (4) the information must be necessary to enable the physician or surgeon to prescribe or act for the treatment of the patient.

*Schoeneweis v. Hamner*, 223 Ariz. 169, 221 P.3d 48, ¶¶ 16–19 (Ct. App. 2009) (petitioner sought to prevent disclosure of wife's autopsy report; court held that physician-patient privilege did not apply to autopsy reports).

**501.620** The physician-patient privilege protects communications between doctor and patient; it does not extend to facts that are not part of the communication, thus the fact that a patient has consulted a doctor, the identity of the patient, and the dates and number of visits to the doctor are not privileged.

*Carondelet Health Network v. Miller*, 221 Ariz. 614, 212 P.3d 952, ¶¶ 4–18 (Ct. App. 2009) (while at hospital, decedent sustained fractured hip; later that morning, decedent's hospital roommate told decedent's wife that decedent had fallen twice that night, and that each time decedent's roommate had notified decedent's nurse; although decedent's wife spoke directly with roommate, she did not obtain roommate's name or contact information; decedent's wife asked trial court to order hospital to disclose roommate's name so she could interview him as witness; court held that, because disclosing roommate's name would not result in disclosing any information about roommate's medical treatment, for hospital to disclose roommate's name would not violate physician-patient privilege).

**501.625** If disclosing the name of a patient does not disclose any information about the medical treatment the patient received, then disclosing the patient's name will not violate the physician-patient privilege, but if disclosing the name of a patient does disclose information about the medical treatment the patient received, then disclosing the patient's name will violate the physician-patient privilege.

*Carondelet Health Network v. Miller*, 221 Ariz. 614, 212 P.3d 952, ¶¶ 4-18 (Ct. App. 2009) (while at hospital, decedent sustained fractured hip; later that morning, decedent's hospital roommate told decedent's wife that decedent had fallen twice that night, and that each time decedent's roommate had notified decedent's nurse; although decedent's wife spoke directly with roommate, she did not obtain roommate's name or contact information; decedent's wife asked trial court to order hospital to disclose roommate's name so she could interview him as witness; court held that, because disclosing roommate's name would not result in disclosing any information about roommate's medical treatment, for hospital to disclose roommate's name would not violate physician-patient privilege).

#### **Waiver by Conduct.**

**501.840** There are three tests used to determine whether a party through litigation has waived a privilege: (1) Under the most restrictive test, the party has either expressly waived the privilege or has impliedly waived it by directly injecting knowledge from a privileged source into the litigation; (2) under the intermediate test, three criteria are present: (a) the asserting party has done an affirmative act, such as filing suit or raising an affirmative defense; (b) through this affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (c) application of the privilege would deny the opposing party access to information vital to that party's case; and (3) under the least restrictive test, a party asserts a claim, counter-claim, or affirmative defense that raises a matter to which otherwise privileged material is relevant; Arizona has adopted the intermediate test as set forth by the Restatement: The attorney-client privilege is waived for any relevant communication if the client asserts for any material issue in the proceeding that the client acted upon the advice of a lawyer or that the legal advice was otherwise relevant to the legal significance of the client's conduct.

*Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 213 P.3d 288, ¶¶ 35-53 (Ct. App. 2009) (plaintiff sued defendant for breach of implied covenant of good faith and fair dealing in administration of her workers' compensation claim; jurors awarded plaintiff \$250,000 in compensatory damages, but no punitive damages; court concluded defendant affirmatively asserted that its actions in investigating, evaluating, and paying plaintiff's claim were subjectively reasonable, thus trial court erred in refusing to order disclosure of attorney-client communications and remanded for new trial on issue of punitive damages).

**501.845** In a case when a litigant claiming the attorney-client privilege relies on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law, and this evaluation necessarily incorporates what the litigant learned from its attorneys, the communications are discoverable and admissible, but when a litigant claiming the attorney-client privilege defends exclusively on the basis that its actions were objectively reasonable and merely asked its attorneys to evaluate the reasonableness of its conduct under the statutes and case law, the party has not waived the attorney-client privilege because it has not put at issue any advice it received from its attorneys.

*Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 213 P.3d 288, ¶¶ 35–53 (Ct. App. 2009) (plaintiff sued defendant for breach of implied covenant of good faith and fair dealing in administration of her workers' compensation claim; jurors awarded plaintiff \$250,000 in compensatory damages, but no punitive damages; court concluded defendant affirmatively asserted that its actions in investigating, evaluating, and paying plaintiff's claim were subjectively reasonable, thus trial court erred in refusing to order disclosure of attorney-client communications and remanded for new trial on issue of punitive damages).

**501.870** A person will usually waive the privilege if the person makes the statement when a third person is present on the ground that the person holding the privilege could not have intended to be confidential those communications the person knowingly allowed to be overheard by someone foreign to the confidential relationship, but this general rule does not apply when the third person's presence does not indicate a lack of intent to keep the communication confidential.

*State v. Archibeque*, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 15–25 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; because purpose of discussion was both repentance process and spiritual guidance and marital advice, court concluded neither presence of wife during discussions with Bishop nor defendant's statement to wife prior to meeting with Bishop waived privilege).

#### **Rule 601. General Rule of Competency.**

**601.050** The determination whether to require a witness to undergo a mental or physical examination is within the sound discretion of the trial court.

*State v. Moore*, 222 Ariz. 1, 213 P.3d 150, ¶¶ 45–48 (2009) (because witness was talking rapidly and got "off track" during questioning, defendant asked trial court to order witness to undergo drug test; court noted that video recording of witness's testimony showed she was coherent and responded appropriately to questioning, even though she had tendency to ramble and interrupt counsel, thus trial court did not abuse discretion in finding witness competent to testify and in not ordering drug test).

#### **Rule 602. Lack of Personal Knowledge.**

**602.010** For a witness to testify about a matter, the witness must have personal knowledge of the matter.

*In re MH 2008-002596*, 223 Ariz. 32, 219 P.3d 242, ¶¶ 12–16 (Ct. App. 2009) (appellant sought relief from order of commitment for involuntary mental health treatment; statute required testimony of two or more witnesses acquainted with patient; appellant contended one witness did not qualify as acquaintance witness because her contact with him was limited to one 15 minute telephone conversation; court held that this telephone conversation gave witness personal knowledge).

## **Rule 604. Interpreters.**

**604.010** The determination whether an interpreter is qualified is left to the sound discretion of the trial court.

*In re MH 2007-001895*, 221 Ariz. 346, 212 P.3d 38, ¶¶ 9-12 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; court held trial court did not abuse discretion in determining interpreter was qualified).

**604.020** This rule requires only that an interpreter be “court qualified”; there is no requirement that an interpreter be “court certified.”

*In re MH 2007-001895*, 221 Ariz. 346, 212 P.3d 38, ¶¶ 9-13 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; court rejected claim that interpreter had to be “court certified”).

**604.040** A presumption exists, based on the oath of the interpreter, that the interpreter will make a proper interpretation of the proceedings.

*In re MH 2007-001895*, 221 Ariz. 346, 212 P.3d 38, ¶¶ 14-15 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; because appellant made no claim to trial court that interpreter was not translating properly, appellate court presumed that all parties were able to hear and understand the proceedings).

**604.050** If a party is contending that the interpreter failed to translate simultaneously all crucial proceedings, the party must present that claim first to the trial court so the trial court will be able to address and correct any problems that exist; if the party does not make such a claim to the trial court, that party will be considered to have waived any error on appeal.

*In re MH 2007-001895*, 221 Ariz. 346, 212 P.3d 38, ¶¶ 14-15 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; because appellant made no claim to trial court that interpreter was not translating properly, appellate court presumed that all parties were able to hear and understand the proceedings; court held that appellant waived any objection that she did not receive a continuous simultaneous translation).

## **Rule 609(a). Impeachment by Evidence of Conviction of Crime — General rule.**

**609.a.020** A felony has probative value on the issue of the credibility of the witness because a major crime entails such an injury to and disregard of the rights of other persons that it can reasonably be expected that the witness will be untruthful if it is to his or her advantage.

*Ritchie v. Krasner*, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 46 (Ct App. 2009) (defendant contended trial court abused discretion in precluding evidence of plaintiff’s prior felony conviction; court noted that felony conviction was admissible only to attack plaintiff’s credibility as witness, and only time plaintiff testified was at deposition; because defendant failed to raise timely plaintiff’s conviction during deposition, trial court did not abuse discretion in excluding evidence of plaintiff’s felony conviction at trial).

**Rule 611(b). Mode and Order of Interrogation and Presentation — Scope of cross-examination.**

**611.b.010** The trial court has considerable discretion in controlling the scope of cross-examination and in determining the relevance and admissibility of the evidence sought; in order to find error in the trial court's restriction of cross-examination, the appellate court must find that the trial court abused that discretion.

*Brethauer v. General Motors Corp.*, 221 Ariz. 192, 211 P.3d 1176, ¶¶ 13–14 (Ct. App. 2009) (at deposition before trial, emergency medical technician (Davis) who had treated plaintiff at accident scene stated that he did not remember what plaintiff said, but he checked box in report that said “not wearing seat belt,” and that he would not have checked that box unless he had good information; trial court granted plaintiff's motion to preclude introduction of Davis's report or his testimony about plaintiff's seat belt usage; during cross-examination of plaintiff, defendant's attorney asked, “Now, after the accident, didn't you tell the paramedics at the scene that you were not wearing your seat belt?”; court held that trial court properly denied plaintiff's motion for mistrial because trial court's order only precluded asking Davis about seat belt usage, it did not preclude asking plaintiff what he said to Davis).

**Rule 702. Testimony by Experts.**

**702.010** Expert testimony based on the witness's own experience, observation, and study, and the witness's own research and that of others, is admissible if (1) the witness is qualified as an expert, and (2) the testimony will aid the jurors to understand the evidence or to determine a fact in issue; for such evidence, there is no requirement that the trial court undergo a reliability analysis.

*Pipher v. Loo*, 221 Ariz. 399, 212 P.3d 91, ¶¶ 16–18 (Ct. App. 2009) (expert witness testified he was board certified with 35 years' experience, that he had administered thousands of injections of type at issue, and had number of patients with type of injury at issue; trial court precluded expert's testimony because it concluded testimony lacked foundation, was speculative, and lacked adequate basis under Rules 702 and 703; court held that trial court erred in excluding this testimony and remanded for new trial).

**Rule 703. Bases of Opinion Testimony by Experts.**

**703.030** Questions about the accuracy and reliability of a witness's factual basis, data, and methods go to the weight and credibility of the witness's testimony, and are questions of fact for the jurors' determination.

*Pipher v. Loo*, 221 Ariz. 399, 212 P.3d 91, ¶¶ 16–18 (Ct. App. 2009) (expert witness testified he was board certified with 35 years' experience, that he had administered thousands of injections of type at issue, and had number of patients with type of injury at issue; trial court precluded expert's testimony because it concluded testimony lacked foundation, was speculative, and lacked adequate basis under Rules 702 and 703; court held that trial court erred in excluding this testimony and remanded for new trial).

**703.035** An expert may not base an opinion on sheer speculation, thus the trial court should not admit a conclusory opinion based on no facts.

*Aida Renta Trust v. Maricopa County*, 221 Ariz. 603, 212 P.3d 941, ¶¶ 18–21 (Ct. App. 2009) (taxpayers brought action for property tax discrimination; trial court granted summary judgment for taxpayers concluding that county had engaged in deliberate and systematic conduct that resulted in greatly disproportionate tax treatment; county contended issue of fact was created by affidavit from appraiser employed by county, which stated that she did not exactly know what had happened, but it must have been an accident; court held that, because opinion in this affidavit was based on speculation, affidavit was not admissible, so it did not create any issue of material fact).

**703.060** Facts or data underlying an expert's opinion need not be admissible so long as the party offering the evidence establishes they are of a type upon which experts in that particular field reasonably rely.

*Pipher v. Loo*, 221 Ariz. 399, 212 P.3d 91, ¶¶ 7–11 (Ct. App. 2009) (court held that trial court properly allowed expert witness to give opinion based on his own laboratory research, his clinical experience, and his interviews with patients and their dentists, even though some of this information was hearsay).

*Brethauer v. General Motors Corp.*, 221 Ariz. 192, 211 P.3d 1176, ¶¶ 18–20 (Ct. App. 2009) (trial court precluded 3-minute videotaped collage of 10 GM-conducted tests on seat belt systems containing same buckle as involved in subject litigation because either other seat belt systems in videotape had different types of belts or the circumstances of test were different; plaintiff contended trial court erred in precluding videotape because his expert relied on videotape in forming his opinion; court stated that mere reliance by expert on data does not automatically make that data admissible).

#### **Rule 801. Hearsay Definitions.**

**Note:** On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

#### **Paragraph (c) — Hearsay.**

**801.c.030** If the out-of-court assertion is admitted for a purpose other than to prove the truth of the matter asserted, then its admission does not violate the right of confrontation.

*State v. Larson*, 222 Ariz. 341, 214 P.3d 429, ¶¶ 20–22 (Ct. App. 2009) (trial court admitted in evidence recorded portions of defendant's interrogation by police in which detective asserted defendant was guilty; defendant contended detective's statement was hearsay and should not have been admitted; court held that, because those portions were admitted to provide context for defendant's response and not to prove truth of matters asserted, detective's statements were not hearsay).

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.**

**Note:** On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

**Paragraph (8) — Public records and reports.**

**803.8.033** This exception allows for admission of records, reports, statements, or data compilations of matters when there is a duty imposed by law to observe and report those matters.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶¶ 25-31 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; court held that trial court properly admitted three FBI reports about this incident drafted by special agent R.S. because they reflected matters R.S. observed or heard and reported pursuant to his FBI duties; court rejected SWA's claim that these were merely preliminary reports and thus should not have been admitted for that reason).

**803.8.045** This rule allows for admission of records, reports, statements, or data compilations of factual findings resulting from investigation made pursuant to authority granted by law.

*Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 212 P.3d 17, ¶¶ 32-37 (Ct. App. 2009) (court did not follow rule that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead followed rule that trial court has discretion to admit such letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

**803.8.070** The trial court may exclude records, reports, statements, or data compilations of public offices or agencies if the sources of information or other circumstances indicate lack of trustworthiness.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶¶ 32-34 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; court held that trial court did not abuse discretion in concluding that FBI reports were trustworthy because (1) they contained relatively straightforward information (customer service agent was on vacation and not available for interview and that messages were left for agent's supervisor), (2) SWA security representative had noted information on SWA form that corroborated reports, (3) FBI agent who prepared reports had no motive to lie, and (4) another FBI agent had approved reports).

**803.8.080** As long as the sources of information or other circumstances indicate trustworthiness, any errors or defects in records, reports, statements, or data compilations of public offices or agencies go to the weight and not the admissibility of the documents.

*Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810, ¶ 33 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; court held that, because sources of information and other circumstances indicate trustworthiness of FBI reports, length of time between event and report (nearly 7 weeks), lack of full explanation, misspellings, and ambiguities in reports went to weight and not the admissibility of reports).

March 3, 2010

SUPREME COURT OF ARIZONA

In the Matter of ) Arizona Supreme Court  
 ) No. R-08-0035  
 PETITION TO AMEND RULE 408, )  
 ARIZONA RULES OF EVIDENCE )  
 )  
 )

ORDER  
AMENDING RULE 408, ARIZONA RULES OF EVIDENCE

A petition having been filed proposing to amend Rule 408, Arizona Rules of Evidence, and comments having been received, upon consideration,

IT IS ORDERED that Rule 408, Arizona Rules of Evidence, be amended in accordance with the attachment hereto, effective January 1, 2010.

DATED this \_\_\_\_\_ day of September, 2009.

REBECCA WHITE BERCH  
Chief Justice

TO:  
Rule 28 Distribution

mwa

**ATTACHMENT<sup>1</sup>**

**Arizona Rules of Evidence**

**Rule 408. Compromise and Offers to Compromise**

(a) **Prohibited uses.** – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromise or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim.

(b) **Permitted uses.** – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

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<sup>1</sup> Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of ) Arizona Supreme Court  
 ) No. R-09-0004  
 PETITION TO ADOPT RULE 502, )  
 ARIZONA RULES OF EVIDENCE )  
 )  
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ORDER  
ADOPTING NEW RULE 502, ARIZONA RULES OF EVIDENCE

A petition having been filed proposing to adopt new Rule 502, Arizona Rules of Evidence, and comments having been received, upon consideration,

IT IS ORDERED that Rule 502, Arizona Rules of Evidence, be adopted in accordance with the attachment hereto, effective January 1, 2010.

DATED this            day of September, 2009.

REBECCA WHITE BERCH  
Chief Justice

TO:  
Rule 28 Distribution

mwa

**ATTACHMENT**

**NEW RULE 502**

**ARIZONA RULES OF EVIDENCE**

**Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work product protection.

**(a) Disclosure made in an Arizona proceeding; scope of a waiver.**

When the disclosure is made in an Arizona proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Arizona proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

**(b) Inadvertent disclosure.**

When made in an Arizona proceeding, the disclosure does not operate as a waiver in an Arizona proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Arizona Rule of Civil Procedure 26.1(f)(2).

**(c) Disclosure made in a proceeding in federal court or another state.**

When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an

Arizona proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Arizona proceeding; or

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

**(d) Controlling effect of a court order.**

An Arizona court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court -- in which event the disclosure is also not a waiver in any other proceeding.

**(e) Controlling effect of a party agreement.**

An agreement on the effect of disclosure in an Arizona proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

**(f) Definitions.**

In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

SUPREME COURT OF ARIZONA

In the Matter of ) Arizona Supreme Court  
 ) No. R-08-0036  
PETITION TO AMEND RULES )  
703 AND 705 OF THE )  
ARIZONA RULES OF EVIDENCE )  
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\_\_\_\_\_ )

ORDER  
AMENDING RULES 703 AND 705, ARIZONA RULES OF EVIDENCE

A petition having been filed proposing to amend Rules 703 and 705, Arizona Rules of Evidence, and comments having been received, upon consideration,

IT IS ORDERED that Rules 703 and 705, Arizona Rules of Evidence, be amended in accordance with the attachment hereto, effective January 1, 2010.

DATED this \_\_\_\_\_ day of September, 2009.

\_\_\_\_\_  
REBECCA WHITE BERCH  
Chief Justice

TO:  
Rule 28 Distribution

mwa

**ATTACHMENT<sup>1</sup>**

**Arizona Rules of Evidence**

**Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

\* \* \* \* \*

**Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

The expert may testify in terms of opinion or inference and give reasons therefor without ~~prior disclosure of~~ first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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<sup>1</sup> Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

Journal of Interpersonal Violence 31(12)

## ORDER

IT IS ORDERED that Rule 804(b)(5) be renumbered as 804(b)(7) and reserved, and that Rule 804(b)(6) be adopted in accordance with the attachment hereto, effective January 1, 2010.

DATED this \_\_\_\_\_ day of September, 2009.

REBECCA WHITE BERCH  
Chief Justice

TO:  
Rule 28 Distribution

mwa

## **ATTACHMENT<sup>1</sup>**

### **Rule 804(b), Arizona Rules of Evidence**

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony (criminal action or proceeding).* Former testimony in criminal actions or proceedings as provided in Rule 19.3(c), Rules of Criminal Procedure.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

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<sup>1</sup> Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

(5) [Reserved]

(6) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

~~(5)~~ (7) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.